

practice of “rounding up.” (Dkt. 70 at para. 19). The contracts between GTE and Plaintiffs, both oral and written, did not provide “an adequate description or disclosure . . . as to GTE’s Rounding Up practices.” (Dkt. 70 at paras. 20 and 22). GTE induced Plaintiffs to enter into the contracts “with advertisements and materials, including, among other things, promises of free air time.” (Dkt. 70 at para. 18).

In the four-count complaint, count I alleges a private action pursuant to 47 U.S.C. section 207 for a violation of the Communications Act of 1934, 47 U.S.C. section 201(b). (Dkt. 70 at para. 37). Plaintiffs assert that “[t]he practice of charging for all air time on a Rounded Up basis is unjust and unreasonable, and therefore unlawful, under the provisions of 47 U.S.C. section 201(b).” (Dkt. 70 at para. 38). Count II seeks an injunction to restrain GTE from “rounding up.” (Dkt. 70 at paras. 40-44).

Count III seeks damages for breach of contract. (Dkt. 70 at paras. 45-50). GTE allegedly breached the oral and written contracts “by charging and collecting more money for cellular phone services than Plaintiffs and class members have agreed to pay.” (Dkt. 70 at para. 48). Count IV constitutes a state law claim based on a violation of section 501.201, et seq., Florida Statutes, which is the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). (Dkt. 70 at paras. 51-57). Plaintiffs allege that “charging for all air time on a Rounded Up basis, without adequately disclosing such practices,” amounts to unfair competition.

Plaintiffs sued a total of seven defendants. Of those seven, two are corporations

authorized to conduct business in Florida, one of which is a Florida corporation and the other a Delaware corporation. (Dkt. 70 at paras. 6 and 7). Four of the remaining five defendants are either Delaware or Texas corporations that provide cellular service throughout the United States “either directly or indirectly through its subsidiaries and affiliates.” (Dkt. 70 at paras. 5, 8, 9, and 10). The **last** defendant is GTE Corporation, a New York corporation that not only provides cellular service throughout the United States “either directly or indirectly through its subsidiaries and affiliates,” but is “the parent corporation of or is otherwise affiliated with all other Defendants.” (Dkt. 70 at para. 4).

### **Argument**

Defendants characterize Plaintiffs’ claims as ones seeking a retroactive rate reduction. Defendants argue that the two state law claims (counts III and IV) are preempted expressly and completely as improper rate regulation in violation of the Federal Communications Act (FCA). As to the state law claim of breach of contract, Defendants contend that the contracts obligate Plaintiffs to pay per minute rates.

Defendants argue that the claim based on the FCA (count I) should fail because per minute billing does not constitute a per se violation and Plaintiffs have not suffered any direct injury from the billing process. **As** to the claim titled “injunction” (count II), no such federal claim exists, and even if it did, Plaintiffs have an adequate remedy at law.

Plaintiffs respond that this purported class action challenges Defendants’

“fraudulent and deceptive promotional and contract practices, not Defendants’ rates.” (Dkt. 76 at 11). Plaintiffs state that they are attacking the deceptive promotional, advertising, contracting and billing practices of Defendants. They suffered injury **by** not receiving the full amount of allocated cellular air time elected under a contract and by being overcharged for air time used in excess of the flat-rate amount allocated under the service plan chosen.

### **Violation of 47 U.S.C. § 201(b)**

Plaintiffs state that one of the issues in this action is whether Defendants violated 47 U.S.C. section 201(b) by “deceptively promoting, contracting and billing Plaintiffs by rounding **up** calls.” (Dkt. 76 at 13). The complaint specifically alleges that the practice of charging for all air time by rounding up is unjust and unreasonable under section 201(b). (Dkt. 70 at para. 38). Thus, at least in count **I**, Plaintiffs do not appear to be challenging the reasonableness of the rates or the failure to disclose a particular billing practice, but rather are challenging the reasonableness of the billing practice itself.

Most of the cases addressing the viability of actions based on the practice of rounding **up** may be divided into three categories: 1) federal cases deciding whether the FCA completely preempts state law claims for purposes of removal jurisdiction; **2)** state

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<sup>2</sup> See, e.g., Marcus v. AT & T Corp., 138 F.3d 46 (2d Cir. 1998); Sanderson, Thompson, Ratledge & Zinny v. AWACS, Inc., 958 F.Supp. 947 (D.Del.1997); Bennett v. Alltel Mobile Communications of Alabama, Inc., No. Civ.A. 96-D-232-N, 1996 WL

cases deciding whether a cause of action exists for breach of contract, fraud, violations of state consumer acts for fraud and unfair trade practices, and various other state law claims,' and federal cases addressing preemption in a non-removal setting.<sup>4</sup> Of the cases addressing removal issues, the courts have found that the complete preemption doctrine, a concept associated with removal jurisdiction, does not extend to the FCA. In so ruling, some courts in dicta wrote that when a plaintiff challenges billing practices as unreasonable, as opposed to challenging improper billing based on deceptive advertising, a claim for relief for damages under section 207 of the FCA is available.'

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1054301 (M.D.Ala. May 14, 1996); DeCastro v. AWACS, Inc., 935 F.Supp. 541 (D.N.J. 1996); In re Comcast Cellular Telecommunications Litigation, 949 F.Supp. 1193 (E.D.Penn. 1996).

<sup>3</sup> See, e.g., Tenore v. AT & T Wireless Services, 962 P.2d 104 (Wash. 1998), cert. denied, No. 98-947, 1999 U.S. LEXIS 1507 (U.S. Feb. 22, 1999).

<sup>4</sup> See In re Long Distance Telecommunications Litigation, 831 F.2d 627,633 (6th Cir. 1987) (primary jurisdiction doctrine required referral of claim regarding reasonableness of defendant's practices to Federal Communications Commission, but state law claims for fraud and deceit based on failure to notify customers of practice of charging for uncompleted calls not preempted by FCA); Stein v. Sprint Corp., 22 F.Supp. 1210 (D.Kan. 1998) (filed-rate doctrine barred claims for fraud and breach of contract and for damages or injunction requiring certain rate be charged, but did not preempt state law claims under state statutes for injunction relating to deceptive advertising).

<sup>5</sup> See Sanderson, Thompson, Ratledge & Zinny v. AWACS, Inc., 958 F.Supp. 947,955-56 (D.Del. 1997) (claims for statutory fraud and breach of contract did not challenge reasonableness of billing practice or rate and therefore did not fall within the scope of civil enforcement of FCA); In re Comcast Cellular Telecommunications Litigation, 949 F.Supp. 1193, 1203 (E.D.Penn. 1996) (true gravamen of complaint was challenge to rates and billing practices and as such action under section 207 would have been available); DeCastro v. AWACS, Inc., 935 F.Supp. 541,550 (D.N.J. 1996) (section 207 does not provide federal cause of action for violations of a knowing failure to

After carefully considering all the cases and pertinent provisions of the FCA, this Court concludes that the FCA permits under section 207 a claim for damages for the reasonableness of a particular billing practice, such as the practice of rounding up.<sup>6</sup> However, this Court must invoke the doctrine of primary jurisdiction and refer the issues raised in this count to the Federal Communications Commission. See Telecommunications Litigation, 831 F.2d at 629-630 (primary jurisdiction applies where claim is originally cognizable in courts but regulatory scheme requires enforcement of the claim by administrative body, quoting United States v. Western Pacific R.R., 352 U.S. 59, 63-65 (1956)).

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disclose a particular billing practice); Weinberg v. Sprint Corp., 165 F.R.D. 431, 438-39 (D.N.J. 1996) (no removal jurisdiction where plaintiffs state law claims related to Sprint's advertising practices rather than the billing practice itself); Marcus v. AT & T Corp., 938 F.Supp. 1158, 1167-69 (S.D.N.Y. 1996) (common law claims arose under federal law and removal was proper).

<sup>6</sup> No mention of the "filed rate" or "filed tariff" doctrine has been made. If this case were governed by the filed rate doctrine, count I would be barred. See Marcus, 938 F.Supp. at 1169-70. This Court assumes that it is inapplicable because Defendants are characterized as commercial mobile radio service providers, which are specifically exempted from tariff filing requirements by the FCA. See Tenore v. AT & T Wireless Services, 962 P.2d 104, 109-10 (Wash. 1998) (citing 47 C.F.R. sections 20.15(a), (c), 20.3, and 20.9(a)). In any event, whether competition in the area of cellular telephone service necessarily makes any rate per se reasonable should be decided by the Federal Communications Commission under the doctrine of primary jurisdiction. See In re Long Distance Telecommunications Litigation, 831 F.2d 627, 631 (6th Cir. 1987) (claims based on 47 U.S.C. 201(b) are within primary jurisdiction of FCC); Kiefer v. P——— Inc., 50 F.Supp. 681, 682 (E.D.Mich. 1999) (reasonableness of standardized late payment charge should be referred to FCC).

## **Florida Deceptive and Unfair Trade Practices Act**

Plaintiffs challenge the failure to disclose the billing practice of rounding **up** as deceptive under the FDUTPA. Applying simple preemption principles, as opposed to the complete preemption doctrine required in removal cases, the courts have found that the FCA does not preempt state law claims attacking the failure to disclose the method by which a customer's bill is determined. Because this claim appears to be one of those which are not preempted by the FCA, count IV will be permitted.

## **Breach of Contract**

Essentially, Defendants argue that because Plaintiffs agreed to per minute billing, Plaintiffs cannot state a cause of action for breach of contract. Plaintiffs respond that although some of the customer contracts contain the term "per minute billing," that term is not defined. On balance, the Court finds that count III alleges sufficient facts at this stage to state a cause of action for breach of contract.

## **Claim for Injunction**

The Court agrees with Defendants that Plaintiffs have failed to allege a cognizable claim for injunctive relief. Plaintiffs have not persuaded this Court that a separate and independent federal claim for injunctive relief exists in this case. Plaintiffs state that they "are not specifically seeking an injunction on a federal common law theory" but that

“such relief is commonly recognized” by the state courts of Florida. (Dkt. 76 at 11). To the extent Plaintiffs seek injunctive relief pursuant to FDUTPA, they must do so in count IV

#### Personal **Jurisdiction** over Non-resident Defendants

Plaintiffs counter the Non-resident Defendants’ arguments with the fact that the contract attached to the complaint specifically defines them as parties to the contract. The customer service agreement attached as Exhibit B to the Third Amended Complaint provides that the agreement “**is** made by GTE Mobilnet Service Corporation, on behalf of its affiliates and subsidiaries.” The complaint alleges that the Non-resident Defendants are either the subsidiaries or affiliates of GTE Mobilnet Service Corporation. (Dkt. 70 at para. 11). Defendants’ counter affidavits have not shown otherwise. Consequently, this Court finds that personal jurisdiction exists over the Non-Resident Defendants.

It is therefore ORDERED AND ADJUDGED as follows:

1. The Dispositive Motion to Dismiss Plaintiffs’ Third Amended Complaint filed by GTE Wireless Incorporated and GTE Wireless of the South Incorporated (Dkt. 72) is GRANTED in part and DENIED in part. The motion is granted as to count II and denied as to counts I, III, and IV.

2. The Dispositive Motion to Dismiss Plaintiffs’ Third Amended Complaint filed by Defendants GTE Corporation, GTE Wireless of Houston Incorporated, GTE

Mobilnet of Cleveland Incorporated, and GTE Mobilnet of the Southwest Incorporated (Dkt. 74) is **DENIED**.


3. Under the doctrine of primary jurisdiction, the Court hereby **REFERS** count I to the Federal Communications Commission (FCC) for a decision. Plaintiffs are directed to file a petition for a determination of the issues contained in count I with the FCC. The Clerk of the Court shall certify a copy of the entire record in this case to be transmitted to the FCC.

4. The remaining claims are hereby **STAYED** pending a determination of the reasonableness of Defendants' billing practice of rounding **up**. The parties shall advise this Court of the FCC's ruling or other determination immediately.

5. All other pending motions including the motion for class certification (Dkt. 50) are **DENIED** with leave to refile after the FCC has rendered its decision.

6. The Clerk is directed to administratively **close** this case.

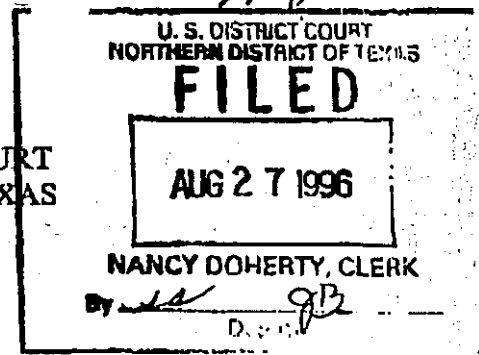
**DONE AND ORDERED** at Tampa, Florida, on this 21 day of October, 1999.

  
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**RICHARD A. LAZZARA**  
**UNITED STATES DISTRICT JUDGE**

**COPIES FURNISHED TO:**  
Counsel of Record

SEP 04 1996

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



ANDY SOMMERMAN on behalf of himself  
and all others similarly situated,

PLAINTIFFS,

v.

3:96-CV-1129-J

DALLAS SMSA LIMITED PARTNERSHIP  
(Improperly Identified As  
SOUTHWESTERNBELL MOBILE  
SYSTEMS, INC., a corporation),

DEFENDANT.

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ORDER

Before the Court is Plaintiffs' 'Motion to **Remand** and Motion for **Costs** and **Attorney Fees**,' filed May **24, 1996**. Defendant responded on June **13, 1996** and Plaintiffs filed a reply on June **28, 1996**. For the reasons set forth below, this Court hereby **GRANTS** Plaintiffs' "Motion to Remand," but **DENIES** Plaintiffs' 'Motion for **Costs** and Attorney Fees "

Background

Plaintiff Sommerman originally brought this action in state court in the 134th Judicial District of Dallas County, Texas. Sommerman's complaint alleges that Defendant **Southwestern Bell Mobile Systems** [hereinafter **SMSA**] uses deceptive, fraudulent, and/or misleading contracts, advertising, and promotional practices designed to conceal its billing practice of rounding up to the nearest minute on each call charged. **SMSA** removed the action to federal court, asserting that this court has federal question jurisdiction because the Federal Communications Act [FCA] provides for federal regulation of the rates charged for such service. Sommerman then moved to remand to state court, arguing that his pleading asserts **only** state causes of action that are not

preempted by the Federal Communications Act.

### Analysis

The FCA does not preempt the claims at issue in this case. The FCA dictates that “no State ~~or~~ local government shall have **any** authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except *that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.*”

47 U.S.C. § 332(c)(3)(A) (emphasis added). “Terms and conditions” was intended “to include such ~~matters as~~ customer billing information and practices and billing disputes and other consumer protection matters.” H.R. REPORT No. 103-111, 103rd Cong., 1st Sess. 261 (1993).

Additionally, the **FCA** expressly provides that “[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or **by** statute, but the provisions of this chapter are, in addition to such remedies.” 47 U.S.C. § 414. As a result, the **FCA** preempts only those state claims based on the regulation of the rates charged by, ~~or~~ the entry of, commercial mobile services. It does not preempt any state claims based on other terms and conditions of those services.

As a result, the deciding issue on remand is the proper characterization of Sommerman’s claims. If Sommerman complains **only** of the rates charged by **SMSA**, then the complaint is preempted by the **FCA**; but if the complaint **is** based only on other “terms and conditions” of the mobile service provided, then the FCA **is** not preemptive. It is clear from Sommerman’s “First Amended Original Petition” that Sommerman complains of SMSA’s allegedly fraudulent and deceptive promotional and contracting practices. In contrast, Sommerman does not allege that

the rates charged are improper. Therefore, this action arises solely out of "other terms and conditions" of commercial mobile service and is not preempted by the FCA.

**Conclusion**

For the reasons stated above, no federal question exists in this case that would provide a basis for federal jurisdiction. Accordingly, the Court find that this case was improvidently removed and it is without jurisdiction. This case is hereby remanded to the 134th Judicial District of Dallas County, Texas.

It is SO ORDERED.

Signed this the 19th day of August, 1996.

  
MARY LOU ROBINSON  
UNITED STATES DISTRICT JUDGE

# Important NEWS

for AT&T customers.

Linda A. Thorpe  
16119 Dew Drop Ln.  
Tampa, FL 33625-1362



Dear Linda A. Thorpe.

I'd like to share some news that could save you money. First, starting with your July statement, we have eliminated the **\$3.00** monthly usage minimum and the **\$1.51** AT&T Carrier Line charge. **This will save you as much as \$4.51 in those months when you make no or few long distance calls.**

Effective July 1, because of our elimination of the **\$3.00** monthly usage minimum, we're adjusting the per-minute rates of state-to-state calls on our **Basic Plan**. Weekend calls will be **14.5¢** a minute, Monday through Friday evening calls will be **22.5¢** a minute, and weekday daytime calls will be **29.5¢** a minute.

We're also offering other calling plans to help you lower your long distance bill depending on when you make most of your calls.

- If, like many customers, you make most of your state-to-state calls on Sundays, AT&T **10¢ Sunday Basic** offers **10¢** a minute on Sundays, **18¢** a minute on Saturdays, and Monday through Friday rates of **22.5¢** a minute during the evening and **29.5¢** a minute during the day – with no minimum charge.
- If you would rather have a lower state-to-state rate on Saturdays, AT&T **10¢ Saturday Basic** offers **10¢** a minute on Saturdays and **18¢** a minute on Sundays, with Monday through Friday rates of **22.5¢** a minute during the evening and **29.5¢** a minute during the day – with no minimum charge.
- If you make most of your state-to-state calls on weekdays or weekday evenings or prefer one flat rate on all your calls with no monthly plan fee and no usage minimum, AT&T **One Rate® Basic** offers **16¢** a minute on all your state-to-state, in-state and local toll calls. **24** hours a day, **7** days a week.

Of course, if you make a lot of calls, you may want to consider the AT&T **One Rate® 7¢** Plan. It includes a monthly fee of **\$5.95** a month, but all your state-to-state calls will cost just **7¢** per minute. (In-state rates may be higher.)

If you would like more information, visit us at **www.att.com** (keyword 87397) or to subscribe to these services, call **1 800 293-9465**, ext. **87397**. We value your business and look forward to serving you for many years to come.

Sincerely,

Robert M. Aquilina  
Senior Vice President, AT&T Consumer Services

Please see Important Information on the back.

ATTACHMENT # 3

## Frequently Asked Questions and Answers

How do I know which is the right plan for me?

A variety of **AT&T** calling plans are available, and you will need to evaluate these plans based on your unique calling patterns. For example, if you make frequent state-to-state long distance calls any day of the week, the **AT&T One Rate<sup>®</sup> 74 Plan** may be the appropriate calling plan for you. If you are interested in a plan that offers a flat rate and no monthly fee or minimum, the **AT&T One Rate<sup>®</sup> Basic Plan** may be the appropriate plan for you.

What do I pay if I sign up for the **AT&T 10¢ Sunday Basic Plan**?

The **AT&T 10¢ Sunday Basic Plan** has no monthly plan fee or minimums, and offers **10¢** a minute for all your state-to-state calls on Sundays. Calls on Saturday are **18¢** a minute, and calls Monday through Friday are **29.5¢** a minute during the day (**7 a.m. to 6:59 p.m.**) and **22.5¢** a minute during the evening (**7 p.m. to 6:59 a.m.**).

What do I pay if I sign up for the **AT&T 10¢ Saturday Basic Plan**?

The **AT&T 10¢ Saturday Basic Plan** has no monthly plan fee or minimums, and offers **10¢** a minute for all your state-to-state calls on Saturdays. Calls on Sunday are **18¢** a minute, and calls Monday through Friday are **29.5¢** a minute during the day (**7 a.m. to 6:59 p.m.**) and **22.5¢** a minute during the evening (**7 p.m. to 6:59 a.m.**).

What do I pay if I sign up for the **16¢ a minute AT&T One Rate Basic Plan**?

The **AT&T One Rate Basic Plan** has no monthly plan fee or minimums, and all of your state-to-state, in-state, and **AT&T Local Toll** calls are **16¢** a minute. Please note: **AT&T One Rate Basic** customers are not eligible for any other local toll rates.

What if I make about **30** minutes of calls at different times of the week and the weekend?

With the **AT&T Monthly Minutes<sup>SM</sup> Plan**, you pay \$3 for 30 minutes of domestic direct-dialed calls each month. After you have used **30** minutes, each additional state-to-state call is **20¢** a minute. In-state rates vary.

What do I pay if I sign up for the **AT&T One Rate 7¢ Plan**?

The **AT&T One Rate 74 Plan** features **7¢** a minute for all of your state-to-state long distance calls for a **\$5.95** monthly fee. The monthly fee is only **\$4.95** if you also have **AT&T Local Toll Service**. In-state rates may be higher.

What happens if I do nothing in response to this letter?

You will continue to stay on your current service of **AT&T Basic Plan** long distance rates and will no longer pay the usage minimum charge.

Why don't I get my **AT&T** bill every month?

**AT&T** customers will not receive an **AT&T** bill until their long distance charges reach \$30, or three months have elapsed. This applies to customers who receive a bill from **AT&T** or who receive their **AT&T** charges in their local telephone bill.

Then why do I still receive a telephone bill each month?

You may still receive a monthly bill from your local telephone company if you are not signed up with **AT&T** for your local service.

Before the  
Federal Communications Commission  
Washington, D.C. 20554

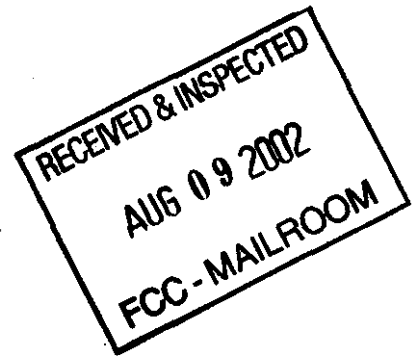
In the Matter of )

Petition for Declaratory Ruling on Issues )  
Contained in Count I of )

White v. GTE )

Class Action Complaint )

WT Docket No. 00-164



**MEMORANDUM OPINION AND ORDER**

**Adopted:** May 23, 2001

**Released:** May 25, 2001

By the Commission:

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we address a Petition for Declaratory Ruling filed by James J. White, Perry Kranias, Ralph DeLuise and Wall Street Connections, Inc. as Representative Plaintiffs in a class action complaint against GTE Corp. et al.<sup>1</sup> Certain legal issues in Count I of the plaintiffs' third amended complaint were referred to the Commission, under the doctrine of primary jurisdiction, for a declaratory ruling on whether certain GTE billing practices are *per se* "unjust and unreasonable" under Section 201(b) of the Communications Act.<sup>2</sup> Specifically, four practices are at issue: (1) charging customers for dead time<sup>3</sup>, (2) charging for unanswered or unconnected calls; (3) measuring the time of a call from the time the "send" button (or other similar button) is pushed; and (4) the practice of "rounding up" any of the foregoing types of charges to the next minute.<sup>4</sup>

2. Based on our review of the record, we deny White's petition and find that the four billing

<sup>1</sup> White v. GTE Corp., No. 97-1859-CIV-T-26C (U.S. District Court, M.D. Fla., Tampa Division, filed July 29, 1997) (White Class Action).

<sup>2</sup> 47 U.S.C. § 201(b).

<sup>3</sup> Parties have not supplied a specific definition for "dead time." For the purposes of this proceeding, we interpret the term to refer to non-communication time associated with neither call initiation nor ringing. For example, dead time might include the time after a signal has faded or time after a called party had terminated the call, but before the wireless subscriber pushes the "end" button.

<sup>4</sup> We note that the use of the term "rounding up" in the White Class Action itself differs significantly from our use of the term. We use the term to refer to charging for a call in the next larger minute increment. In the White Class Action, "rounding up" is used to describe all of the four different billing scenarios listed here.

**EXHIBIT G**

practices at issue are not *per se* unjust or unreasonable under Section 201. We do not, however, preclude the possibility that in specific cases, in the context of the related contractual services and marketing practices of the CMRS provider, these practices may be found to be in violation of Section 201.

## II. BACKGROUND

3. On October 29, 1998, the Representative Plaintiffs filed their Third Amended Complaint in a class action lawsuit against GTE and many of its subsidiaries in the U.S. District Court for the Middle District of Florida, Tampa Division. In addition to General Allegations, the Plaintiffs' Third Amended Complaint included four counts against GTE: (1) violation of 47 U.S.C. 201(b) for "unjust and unreasonable" billing practices; (2) an action for injunctive relief to enjoin and restrain GTE from continuing these practices; (3) breach of contract; and (4) violation of Florida's Unfair and Deceptive Trade Practices Act.<sup>5</sup>

4. On October 21, 1999, the Court issued an Order in response to GTE's Dispositive Motion to Dismiss Plaintiffs Third Amended Complaint, which, among other things, referred certain legal issues relating to Count I to this Commission for decision under the doctrine of primary jurisdiction.<sup>6</sup> The remaining counts were stayed pending the Commission's determination of the issues contained in Count I. All other pending motions, including the motion for class certification, were denied but with leave to refile after the FCC has rendered its decision.<sup>7</sup>

5. On February 2, 2000, the Plaintiffs filed a Petition for Declaratory Ruling on the Issues Contained in Count I of White Class Action. In its petition, White asks the Commission to issue a declaratory ruling that the billing practices at issue in Count I constitute unjust and unreasonable billing practices in violation of Section 201(b).<sup>9</sup> The issues of breach of contract, deceptive or unfair practices due to improper disclosure or the preemptive effect of Section 332 are not at issue here. GTE filed an opposition to the White petition on February 10, 2000. On March 3, 2000, the Plaintiffs moved for acceptance of late-filed comments and submitted a reply to GTE's opposition.

6. In a Public Notice released on September 29, 2000, the Wireless Telecommunications Bureau invited comment on the issues presented, in light of our decisions in *SBMS* and *WCA*,<sup>10</sup> the

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<sup>5</sup> Third Amended Complaint, Plaintiffs Exhibit A at 8-12.

<sup>6</sup> Order, Plaintiffs Exhibit B, at 7, 10.

<sup>7</sup> *Id.* at 10.

<sup>8</sup> *Id.*

<sup>9</sup> Petition at 2.

<sup>10</sup> Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Initiation Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, FCC 99-356, *Memorandum Opinion and Order*, 14 FCC Rcd 19898 (1999) (*SBMS Order*). Wireless Consumers Alliance, Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio (continued. ...)

latter of which was released August 14, 2000. Eleven comments were received. In addition, four reply comments were filed.<sup>11</sup> Industry commenters take the position that all four practices under discussion are neither unjust nor unreasonable.<sup>12</sup> In support of their position, they contend that these practices reflect competitive market conditions and these charges are reasonably related to the cost of providing service.<sup>13</sup> They also argue that in a market as competitive as that among CMRS providers, if a consumer is not happy with one company's service agreement, the consumer can choose a different plan offered by another provider.<sup>14</sup>

7. Petitioners and other consumer commenters assert that it is both unjust and unreasonable to charge for non-communication time and the injury is further compounded by permitting those charges to be rounded up." Some commenters contend that customers do not have a reasonable expectation that they would be billed for such time based on their wireline experience,<sup>16</sup> and that allowing CMRS carriers to bill for such time rewards poor service.<sup>17</sup>

### III. DISCUSSION

8. In this Memorandum Opinion and Order, we examine, as requested by the court, whether or not the billing practices described in Count I of Plaintiffs' Third Amended Complaint are *per se* unjust or unreasonable under Section 201(b). The factors we consider include the relationship of carrier costs to billing charges or practices, consumers' expectations based on their wireline experience, and the role of competitive markets. From our examination of these factors, we deny the Plaintiffs' petition.

(Continued from previous page)

Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, WT Docket No. 99-263, *Memorandum Opinion and Order*, FCC 00-292, 15 FCC Rcd 17021 (2000) (*WCA Order*).

<sup>11</sup> A list of comments and reply comments is attached in the Appendix.

<sup>12</sup> See AT&T Comments at 2; Alloy Comments at 6; Excel Comments at 7; CTIA Comments at 4; Nextel Comments at 4; STPCS Comments at 6; Sprint Comments at 8; U.S. Cellular Comments at 3-4; Verizon Comments at 3, 10; Verizon Reply at 2.

<sup>13</sup> See Alloy Comments at 6; CTIA Comments at 3; Excel Comments at 6; Nextel Comments at 4-8; STPCS Comments 3-8; U.S. Cellular Comments at 3-4; Verizon Comments at 3, 11-13; Verizon Reply at 2-3.

<sup>14</sup> See Alloy Comments at 3, 5; Nextel Comments at 3; Sprint Comments at 6-8, 14; Verizon Comments at 3, 9; Verizon Reply at 2.

<sup>15</sup> See Fontana Comments at 1 (unpaginated); Waring Comments at 1 (unpaginated); WCA Reply at 5-6.

<sup>16</sup> WCA Reply at 3-5; Newcomb at 1 (unpaginated) ("none of these practices is unjust or unreasonable, *per se* . . . failure to clearly and completely inform the consumer of practices to which they are accustomed in the wireline industry can, under some circumstances become unjust and unreasonable, in aggregate.").

<sup>17</sup> Fontana Comments at 1 (unpaginated); Waring Comments at 1 (unpaginated)

9. Several commenters argue that this Commission has already decided in its *SBMS* Order that practices at issue in this petition *are* not in violation of Section 201.<sup>18</sup> We disagree. Instead, we agree with WCA's narrower interpretation of the *SBMS* Order, where we held that for completed CMRS calls, neither "rounding up" nor charging for in-coming calls were *per se* violations of Section 201.<sup>19</sup> The *SBMS* Order addressed only certain charging practices:<sup>20</sup> but not the issues raised by White regarding charges for time from the moment the "send" button is pushed, for dead time, or for unanswered or unconnected calls. Thus these issues are properly before this Commission in the context of this request for declaratory ruling. In other words, we conclude that the *SBMS* Order addressed only the rounding up of communication time for completed calls, while White presents the issue of billing for non-communication time for both completed and uncompleted calls and the rounding-up of any calls that include non-communication time in their time measurement.

**A. Charging for dead time, unanswered or unconnected calls, and charging from the time the "send" button is pushed.**

10. We begin by addressing the first three practices -- charging for dead time, charging for unanswered or unconnected calls, and charging from the time the "send" button is pushed -- because they involve similar legal issues. Section 201(b) of the Communications Act provides: "All charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . ."<sup>21</sup> In the *SBMS* Order, we analyzed the specific practices at issue in terms of whether they reasonably reflect a carrier's cost, whether the practices were common for interexchange services as well as for CMRS services, and whether the practices reflect competitive market conditions.<sup>22</sup>

11. **Costs.** Carriers assert that these charges are derived from both the direct costs of using the network and the opportunity costs that become significant due to nature of CMRS operations. We concur with carriers that charging for the time a network is engaged but no actual conversation occurs is related to the costs associated with the network functions that occur even if call is not completed.<sup>23</sup> These include costs for: seizing a channel, setting up the trunk, interconnecting with the LEC, establishing in-band or out-of-band signaling, providing answer supervision, and recording detail information for all attempted and completed calls, as well as costs related to switching the voice channel to another available channel as a caller moves from cell to cell.<sup>24</sup> Nextel states that billing for unanswered calls is just and reasonable because, from the moment the

<sup>18</sup> STPCS Comments at 3-4; USCC Comments at 3; Sprint Comments at 4, 8-9; CTIA at 2.

<sup>19</sup> WCA Reply at 2-3.

<sup>20</sup> *SBMS* Order, 14 FCC Rcd at 19905-6 (para. 17).

<sup>21</sup> 47 U.S.C. § 201(b).

<sup>22</sup> *SBMS* Order, 14 FCC Rcd at 19904 (para. 14).

<sup>23</sup> Verizon Reply at 2 and n. 6; Alloy at 6; Nextel at 5; STPCS at 4.

<sup>24</sup> Verizon Comments at 12. *See also* STPCS Comments at 4-5; USCC Comments at 3.

send button is pressed, there are “costs of running the network and processing that phone call.”<sup>25</sup> Such use of system hardware and software should be considered operating costs.<sup>26</sup> We acknowledge, as WCA points out, that interexchange carriers also incur network costs for uncompleted calls, yet they do not charge for such calls.<sup>27</sup> The difference in billing practice does not imply, however, that the charges are unrelated to actual costs.

12. *Interexchange services and consumer expectations.* Petitioners and other consumer commenters argue that we should consider the expectation of consumers based on their wireline telephone experience in determining whether the charges in question are unjust or unreasonable. In deciding in the *SBMS Order* that rounding **up** for CMRS calls was not *per se* unjust or unreasonable, we noted that wireline calls have historically been billed on a rounded up, whole minute basis.<sup>28</sup> In contrast, WCA argues, consumers would find it to be an unreasonable expectation to be charged for dead air time based on their wireline experience.<sup>29</sup>

13. We recognize that wireline carriers generally do not charge for unconnected calls (where the line is busy or unanswered), nor do they charge for set-up time for a call even though wireline services also use system and plant for unconnected calls. In contrast, in the case of wireless service, charges typically begin at the time the “send” button is pressed. Although we **look** to wireline service for historical perspective, the practices used there are not necessarily controlling of whether a practice is in violation of Section 201(b). For example, even though wireline customers are not billed for incoming calls, we did not find in the *SBMS Order* that this rendered charging for incoming calls to CMRS phones *aper se* violation of Section 201.<sup>30</sup>

14. It should be understood, however, that we conclude only that these rate structures are not in themselves “unjust or unreasonable” in violation of Section 201(b) of the Act. Thus, as we stated in the *SBMS Order*, “[w]e do not conclude that the implementation of these industry practices by CMRS providers will necessarily be lawful under Section 201(b) of the Act in all circumstances and without regard to other contractual, service and marketing practices of the CMRS provider.”<sup>31</sup> Section 201, as well as consumer protection laws, prohibit deceptive practices that constitute unjust or unreasonable practices.<sup>32</sup> If a carrier employs unreasonable practices, the carrier may be found to

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<sup>25</sup> Nextel Comments at 6.

<sup>26</sup> Nextel Comments at 5.

<sup>27</sup> WCA Reply at 5.

<sup>28</sup> See *SBMS Order*, 14 FCC Rcd at 19905 (para. 15).

<sup>29</sup> WCA Reply at 3 and n. 8 (citing comment by Newcomb)

<sup>30</sup> *SBMS Order*, 14 FCC Rcd at 19904-05 (paras. 14-15).

<sup>31</sup> *Id.* at 19905 (para. 15).

<sup>32</sup> See *Business Discount Plan, Inc., Apparent Liability for Forfeiture*, File No. ENF 98-02, *Order of Forfeiture*, 15 FCC Rcd 14461, 14468-70, 14472 and n.65 (paras. 14-18, 24) (2000), *aff'd on recon.*, 15 FCC Rcd 24396, 24398-400, and n.46 (paras. 5-9); see also, *WCA Order*, 15 FCC Rcd at 17039-40 (para 35); *SBMS Order*, 14 FCC Rcd at 19904-05 (para. 15).

be in violation of Section 201(b) or consumer protection laws, even if the rates and rate structures themselves are not unreasonable.<sup>33</sup>

15. *Competitive market conditions.* When Congress established commercial mobile radio services as a distinct category of common carrier, its general intent was for prices to reflect the competitive market.<sup>34</sup> The Representative Plaintiffs do not object to allowing a competitive market to operate in setting CMRS prices. However, they view the Commission's role as enforcing Section 201(b) in a manner that prevents unjust or unreasonable practices from influencing the market." From their viewpoint, the argument put forth by carriers that competition is better than regulation concerning pricing is irrelevant to the particular billing practices contained in Count I.

16. Although CMRS carriers are free to operate in a deregulated (i.e., non-tariffed), competitive market environment, the mere fact that CMRS providers engage in a particular practice does not make it just and reasonable under Section 201. Section 201 and consumer protection laws exist to prohibit deceptive, unfair, and unreasonable practices. These laws are applicable in competitive markets. While we may examine the effect a competitive market appears to have with respect to particular practices, it is just one factor to consider in determining if a practice is in violation of Section 201.

17. It appears that in this instance, a competitive, deregulated market has enabled carriers to adopt different types of services and billing practices. With regard to the practice of determining at what point a call is initiated for purposes of starting charging, of the four companies mentioned by Verizon, three charge from the time the "send" button is pressed while one charges from the time a voice channel is seized.<sup>36</sup> As for billing for ring time on busy or unanswered calls, we are aware of at least four different billing practices ranging from no charge for uncompleted calls, to no charge for calls lasting less than one minute, to no charge for completed calls lasting less than 2 seconds.<sup>37</sup> In this market, consumers can factor these different practices into their assessment of the total package of services offered by each carrier, provided these practices are fully disclosed to the consumer.

18. *Conclusion.* Upon consideration of the relationship with carrier costs, consumer expectations, and the effect of the competitive market, we hold that these three billing practices are not in themselves *per se* "unjust nor unreasonable" in violation of Section 201(b). Consistent with our conclusions in the *SBMS* Order however, we do not conclude that the implementation of these practices "will necessarily be lawful under Section 201(b) of the Act in all circumstances and without regard to other contractual, service, and marketing practices of the CMRS provider."<sup>38</sup>

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<sup>33</sup> See *SBMS Order*, 14 FCC Rcd at 19905 (para. 15).

<sup>34</sup> See H.R. Conf. Rep. No. 103-213 at 490-491 (1993).

<sup>38</sup> White Reply at 6

<sup>36</sup> Verizon Comments at 8.

<sup>37</sup> Verizon Comments at 8-9; Nextel Comments at 5.

<sup>38</sup> See *SBMS Order*, 14 FCC Rcd at 19905 (para. 15)

## B. Rounding up.

19. The Representative Plaintiffs also allege that the practice of rounding up the time for a call that includes any above three practices is unjust and unreasonable under Section 201.<sup>39</sup> In this Order, we have determined that the practice of charging for these three practices time is not *per se* a violation of Section 201. In addition, the Commission has already found that the practice of rounding up rates to the next minute for completed calls is not *per se* an unjust or unreasonable practice.<sup>40</sup> In *SBMS* we acknowledged that charging on a whole minute basis “is a simplified method on which to base charges which still reflect general costs.”<sup>41</sup> We also noted that interexchange services have historically been billed on a rounded-up, whole minute basis and that this is still the most common billing practice for both CMRS and interexchange carriers.<sup>42</sup> Nothing has been presented in this proceeding, with respect to the practices here complained of, that would lead us to conclude rounding up in conjunction with these practices is inherently unjust or unreasonable. We therefore conclude that rounding up of calls that include non-communication time is not a *per se* violation of Section 201. However, as with the other practices discussed in this order, we do not preclude the possibility that in the context of related contractual, service, and marketing practices of the CMRS provider, this practice may be found to be in violation of Section 201 in specific cases.

## IV. ORDERING CLAUSE

20. Accordingly, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 154 (j), Section 5 (d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission’s Rules, 47 C.F.R. § 1.2, IT IS ORDERED, that the Petition for Declaratory Ruling filed by White et al. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>39</sup> Petition at 2.

<sup>40</sup> *SBMS Order*, 14 FCC Rcd at 19904-05 (paras. 14-15).

<sup>41</sup> *Id.* at 19904 (para. 14).

<sup>42</sup> *Id.*

## APPENDIX

## Comments

Alloy LLC	Alloy
AT&T Wireless Services	AT&T
Cellular Telecommunications Industry Ass'n	CTIA
Excel Communications	Excel
Fontana, Thomas	Fontana
Newcomb, Donald	Newcomb
Nextel Communications, Inc.	Nextel
Sprint PCS	Sprint
STPCS Joint Venture, LLC	STPCS
Verizon Wireless	Verizon
Waring, Malcolm	Waring

## Late-Filed Comments

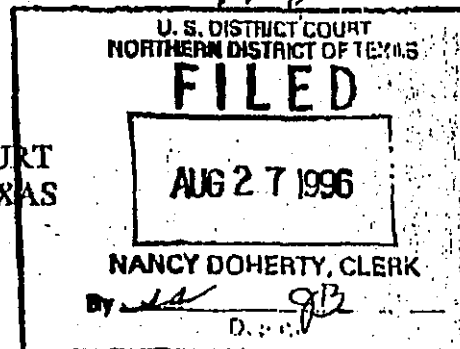
U.S. Cellular Corporation	U.S. Cellular
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## Reply Comments

Staack, Simms & Hernandez, P.A.	White
Verizon Wireless	
Wireless Consumers Alliance	WCA

SEP 04 1996

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



ANDY SOMMERMAN on behalf of himself  
and all others similarly situated,

PLAINTIFFS,

v.

DALLAS SMSA LIMITED PARTNERSHIP  
(Improperly Identified As  
SOUTHWESTERN BELL MOB —  
SYSTEMS, INC., a corporation),

DEFENDANT.

3:96-CV-1129-J

ORDER

Before the Court is Plaintiffs' Motion to Remand and Motion for Costs and Attorney Fees," filed May 24, 1996. Defendant responded on June 13, 1996 and Plaintiffs filed a reply on June 28, 1996. For the reasons set forth below, this Court hereby GRANTS Plaintiffs' "Motion to Remand." but DENIES Plaintiffs' "Motion for Costs and Attorney Fees."

Background

Plaintiff Sommerman originally brought this action in state court in the 134th Judicial District of Dallas County, Texas. Sommerman's complaint alleges that Defendant Southwestern Bell Mobile Systems [hereinafter SMSA] uses deceptive, fraudulent, and/or misleading contracts, advertising, and promotional practices designed to conceal its billing practice of rounding up to the nearest minute on each call charged. SMSA removed the action to federal court, asserting that this court has federal question jurisdiction because the Federal Communications Act [FCA] provides for federal regulation of the rates charged for such service. Sommerman then moved to remand to state court, arguing that his pleading asserts only state causes of action that are not

EXHIBIT

H

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9-4-96 PURSUANT  
TO F. R. C. P. RULES

preempted by the Federal Communications **Act**.

### **Analysis**

The FCA does not preempt the claims at issue in this case. The FCA dictates that “no State or local government shall have **any** authority to regulate the entry of or the rates charged by any commercial mobile service or **any** private mobile service, *except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.*”

**47 U.S.C. § 332(c)(3)(A)** (emphasis added). “Terms and conditions” was intended “to include such matters **as** customer billing information **and** practices and billing disputes and other consumer protection matters.” **H.R. REPORT NO. 103-111**, 103rd Cong., 1st Sess. **261 (1993)**.

Additionally, the **FCA** expressly provides that “[n]othing in this chapter contained shall in any way abridge or alter **the** remedies now existing at common law **or** by **statute**, but the provisions of **this** chapter are in addition **to** such remedies.” **47 U.S.C. § 414**. **As a** result, the **FCA** preempts only those state claims based on the regulation of the rates charged by, or the **entry of** commercial mobile services. It does not preempt any state claims based **on** other terms and conditions of those services.

**As a** result, the deciding issue on remand is the proper characterization of Sommerman’s claims. If Sommerman complains only of the rates charged by **SMSA**, then the complaint is preempted by the **FCA**; but if the complaint is based only on other “**terms and conditions**” **of the** mobile service provided, then the **FCA** is not preemptive. It is clear from Sommerman’s “First Amended **Original** Petition” that Sommerman complains of **SMSA**’s allegedly fraudulent and deceptive promotional **and** contracting practices. In contrast, Sommerman **does** not allege that

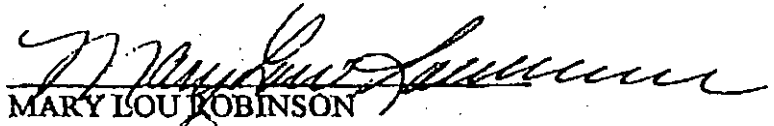
the rates charged are improper. Therefore, this action arises solely out of "other terms and conditions" of commercial mobile service and is not preempted by the FCA.

### **Conclusion**

For the reasons stated above, ~~m~~ federal question exists in this case that would provide a basis for federal jurisdiction. Accordingly, the ~~Court~~ find that this case ~~was~~ improvidently removed and it is without jurisdiction. This case is hereby remanded to the 134th Judicial District of Dallas County, Texas.

**It is SO ORDERED.**

Signed this 19th day of August, 1996.

  
MARY LOU ROBINSON  
UNITED STATES DISTRICT JUDGE